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762-197—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 804

TRANSOCEAN AIR LINES, A CORPORATION; TRANSOCEAN CORPORATION OF CALIFORNIA; ORVIS M. NELSON; AND JOHN COSTELLO, AS TRUSTEE OF THE ESTATE OF TRANSOCEAN AIR LINES, A CORPORATION (BANKRUPT), PETITIONERS

v.

IRVING BEN COOPER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The court of appeals filed no opinion in denying the petition for a writ of mandamus. The memorandum opinion of the district court (Pet. B1–B4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1964 (Pet. D1). The petition for a writ of certiorari was filed on January 4, 1965. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Rules of Civil Procedure require that a demand for jury trial "of any issue triable of right by a jury" be served "not later than 10 days after the service of the last pleading directed to such issue," and provide that any demand for jury trial not timely served is waived. Plaintiffs (petitioners) filed a demand for a jury trial as of right on two claims (numbers five and nine) of an amended complaint. The demand was filed more than 10 days after service of defendants' answers to the amended complaint, but within 10 days of plaintiffs' reply to the counterclaims of one defendant.

The question presented is whether the district court correctly ruled, upon an analysis of all of the pleadings, that plaintiffs' reply to the counterclaims was not a pleading "directed to [the] issue[s]" raised in the fifth and ninth claims of the amended complaint and that plaintiffs' jury demand was therefore untimely as to those claims.

RULES INVOLVED

Rules 38 and 39 of the Federal Rules of Civil Procedure are set forth in the petition at pp. A2–A3.

STATEMENT

Petitioners (plaintiffs)[1] seek a writ of certiorari to review a unanimous decision of the Second Circuit

[1] The two corporate petitioners, Transocean Air Lines and Transocean Corporation of California, are referred to as TAL and TCC, respectively.

denying, without opinion, a petition for a writ of mandamus against District Judge Cooper. Judge Cooper, on June 17, 1964, had granted defendants' motion, pursuant to Rule 38(d) of the Federal Rules of Civil Procedure, to strike as untimely part of petitioners' demand for a jury trial. The pertinent facts are as follows:

Petitioners' amended complaint, served on December 19, 1963 (Pet. 4), charged four defendants [2] with monopolization and restraint of trade in the air transportation industry. The allegations were embodied in ten claims, five seeking treble damages for alleged violations of the Sherman Act and five based upon common law theories, including breach of contract, inducement of breach of contract and unfair competition. Damages in excess of $200,000,000 are sought.

The answers of the various defendants, denying the allegations of wrongdoing and asserting certain affirmative defenses, were served by Continental, Pan American and Aviation Financial Services on February 3, 1964, and by Boeing on February 6, 1964 (see Pet. 4). Defendants Continental, Pan American and Aviation Financial Services asserted no counterclaims; so far as these three parties are concerned, there were no pleadings subsequent to the answers. The answer of the fourth defendant, Boeing, asserted two counterclaims—one against each corporate plaintiff. Those counterclaims (Pet. F1–F2) were based

[2] Defendants in the district court are Continental Air Lines, Inc. ("Continental"), Pan American World Airways, Inc. ("Pan American"), Aviation Financial Services, Inc., and The Boeing Company ("Boeing").

on certain promissory notes and a small additional indebtedness arising from the sale of spare parts and from services rendered.

TAL and TCC's reply (Pet. G1–G2) to the Boeing counterclaims was served on April 9, 1964. Their jury demand was served on all defendants on April 13, 1964 (Pet. H1). Petitioners thus served the jury demand within 10 days of their reply to the counterclaims of defendant Boeing, but more than two months after all defendants (including Boeing) had served their answers.

Defendants thereupon moved to have the jury demand stricken in part, *i.e.*, insofar as it related to the issues raised in the amended complaint. The demand for jury trial of the issues raised by the counterclaims was not opposed. Petitioners urged that as to the issues raised by the fifth and ninth claims of the amended complaint they were entitled to jury trial as of right under Rule 38(b), contending that those claims related to the counterclaims and reply. They also requested the district court to exercise its discretion under Rule 39(b) to permit a jury trial on all other claims as well.

Judge Cooper held that petitioners' reply (the only pleading served within ten days prior to the jury demand) could not be considered a pleading directed to the issues presented by the fifth and ninth claims. Those claims, he concluded, involved issues "not even remotely connected with those presented by the coun-

terclaim and reply" (Pet. B4). Moreover, he found no reason to exercise his discretion so as to relieve petitioners of the effect of their failure to serve a timely jury demand (Pet. B3).

Proceeding in the court of appeals by petition for a writ of mandamus, petitioners sought to vacate "so much of [Judge Cooper's] Order of June 17, 1964 as denies to petitioners a trial by jury of the Fifth and Ninth Claims of the Amended Complaint" (Pet. C6). On October 5, 1964, that court (Lumbard, Chief Judge, and Moore and Smith, Circuit Judges) entered an order denying the petition (Pet. D1).

ARGUMENT

We note at the outset, in order to avoid any confusion, that this is a purely private litigation in which the United States is in no way involved. The Solicitor General appears on this brief as counsel to the respondent District Judge upon his request.

It is submitted, on his behalf, that the petition should be denied. The challenged ruling turns solely upon an analysis of the particular pleadings. It enunciates no novel or questionable legal standard. There was no occasion for intervention by extraordinary writ and there certainly is none for further review.

Rule 38(b) of the Federal Rules of Civil Procedure provides that a demand for "a trial by jury of any issue triable of right by a jury" must be served "not later than 10 days after the service of the last plead-

ing directed to such issue." The district court stated (Pet. B3):

> Where the issues raised by the counterclaim and reply are essentially similar to those in the complaint, a jury demand, timely as to the former but not the latter, will extend to all the issues in the case.

It found, however, that the factual issues in the fifth and ninth claims of the amended complaint were "not even remotely connected with those presented by the counterclaim and reply" (Pet. B4). Both this determination and the resulting conclusion that the demand for jury trial was untimely are clearly correct.

(*a*) The fifth claim[3] charged Boeing with violations of Sections 1 and 2 of the Sherman Act. It alleged that TAL agreed to purchase from Boeing four piston-engine aircraft called "stratocruisers", which Boeing had obtained from British Overseas Airways Corporation; that TAL thereafter assisted The Babb Company in entering into an exclusive agreement with British Overseas whereby Babb would sell for British Overseas certain spare parts for stratocruisers; that Babb refused to sell any of those spare parts to TAL; and that the purpose of this refusal was to force TAL to purchase ten additional stratocruisers from Boeing, four of which were to be cannibalized for spare parts. As a result of the alleged conspiracy between Boeing and Babb, it was charged that competition among United States flag air carriers in the Pacific

[3] That claim is contained in paragraphs 106–118 of the amended complaint (Pet. E1–E5).

and competition among sellers of piston aircraft and spare parts have been restrained and monopolized. Treble damages in excess of $14,000,000 were requested.

The ninth claim[4] was based upon common law theories of slander of property, malicious interference with business relations and unfair competition. The claim restated the above charge of conspiracy between Boeing and Babb. It then charged that Boeing and Pan American conspired to have Boeing abrogate a contract to sell TAL three jet aircraft; that Boeing, Pan American and Continental conspired with the result that Japan Air Lines breached an agreement to lease jet aircraft from TAL and negotiated to lease jets from Continental instead; and that Pan American, Boeing and Aviation Financial Services conspired to prevent TAL from obtaining financing during the period shortly before TAL suspended operations. As a result of the above activities, TAL asserted, it failed to receive military air transportation service contracts; did not obtain a certificate from the Civil Aeronautics Board to provide unrestricted air carriage over the Pacific; suffered the cancellation of its supplemental certificate; and was forced to suspend flying operations. Damages in excess of $15,000,000 were requested.

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[4] That claim is contained in paragraphs 136–140 of the amended complaint (Pet. E5–E6). The factual allegations on which the charged violations are based are contained in paragraphs 46–64, 68, 69, 71, 114–117 of the amended complaint, which are realleged but not set forth in the ninth claim.

The Boeing counterclaims sought recovery on installment promissory notes in the amount of $5,017,589.46, given by TAL and guaranteed by TCC; and a small additional indebtedness for spare parts, for a down payment on a piston aircraft, and for services rendered by Boeing to TAL. Boeing alleged that TAL had been adjudicated a bankrupt; that Boeing's claim against TAL in that proceeding had been allowed in full; and that Boeing had filed and proved its claim against TCC (Pet. F1–F2).

The issues raised by the reply primarily involve the amount due on the notes. Petitioners did not deny the allegation that TAL had executed, and that TCC had guaranteed, the promissory notes in favor of Boeing for good and valuable consideration and they admitted that "some amount together with interest is due Boeing" on those notes (Pet. G1). The reply denied the additional indebtedness of $46,824.12, and that Boeing's claim in the bankruptcy proceedings had been fully allowed. It contained no affirmative defenses and in no way referred to the charges in the fifth and ninth claims by way of defense to the Boeing counterclaims.

The contrast between the antitrust and tort issues raised by the fifth and ninth claims of the amended complaint and the routine commercial issues framed by the counterclaim and reply is manifest. The district court's ruling that the latter were not "directed to [the] issue[s]" (Rule 38 (b)) in the complaint seems wholly unexceptionable.

(*b*) In granting the motion to strike, the district court relied on the Second Circuit's decision in *Gold-*

blatt v. *Inch,* 203 F. 2d 79, 80, which held that a counterclaim does not hold open the time for serving a demand for jury trial on an issue in a complaint when "the counterclaim relate[s] to a wholly distinct issue." See also, *Monolith Portland Midwest Co.* v. *Reconstruction Finance Corp.,* 240 F. 2d 444 (C.A. 9), certiorari denied, 354 U.S. 921; *Binger* v. *Unger,* 7 F.R.D. 121 (S.D.N.Y.). Petitioners' essential contention, for which no cases are cited, appears to be that the filing of a compulsory counterclaim, as a matter of law, extends the time for serving a jury demand covering any and all issues in the case (Pet. 6–8).[5] This argument, we believe, is without merit.

The plain wording of Rule 38(b) compels the conclusion that the critical fact, for purposes of measuring the ten-day period, is the similarity of the "issue[s]" in the complaint and "the last pleading." To be sure, there is a line of authority which suggests that a counterclaim is not a further pleading for purposes of applying Rule 38(b). Those cases, criticized by Professor Moore (5 Moore's *Federal Practice* 314–315), indicate that a counterclaim and reply do not extend the original suitor's time for a jury demand even when they are directed to the same issues framed by the complaint. That, however, was not the view

[5] Rule 13(a) of the Federal Rules of Civil Procedure provides that what would otherwise be a compulsory counterclaim need not be asserted if "at the time the action was commenced the claim was the subject of another pending action" (Pet. A1). The claims contained in Boeing's counterclaims in this action had previously been asserted in the bankruptcy proceedings (Pet. 8).

adopted by Judge Cooper. He agreed that when there is similarity between the issues posed by the counterclaim and those involved in the complaint "a jury demand, timely as to the former but not the latter, will extend to all the issues in the case" (Pet. B3). Since he has followed the less restrictive line of authority, petitioners can point to no conflict on the point relevant to the disposition of this case.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

FEBRUARY 1965.

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[6] We do not read Professor Moore's discussion to say that the time for a jury demand is extended by the Rule when a counterclaim raises wholly dissimilar issues. The cases he cites with approval (*op. cit.*, p. 314 *et seq.*) are entirely consistent with the result reached in the instant case, and we know of no case which holds that a judge is bound to grant relief from the time limitation in circumstances where the cause of action stated in the counterclaim presents discrete issues.

Petitioners' reliance on *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, and *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (Pet. 10, 11), is wholly misplaced. Those cases involved the right to jury trial where legal and equitable issues are to be tried under the unified procedure of the Civil Rules. Nothing comparable is involved in the present case. Here, petitioners concededly could have obtained a jury trial as to all issues in the case by a timely demand therefor. By the same token, there can be no basis for a suggestion that the courts below have departed from the strictures of the Seventh Amendment.

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